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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On *Writ* of *Certiorari* To The
Supreme Court Of The State Of South Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND THE NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE NATIONAL CATTLEMEN'S ASSOCIATION

Mountain States Legal Foundation (MSLF) respectfully petitions to file the annexed brief *amici curiae* pursuant to Supreme Court Rule 37. *Amici* have obtained the written consent of Petitioner which has been provided to the Clerk of the Court under separate cover. Respondent has declined to give consent.

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation organized

pursuant to the laws of the State of Colorado and dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country, including South Carolina. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in environmental and property rights issues.

MSLF has participated in numerous cases before this Honorable Court both as an *amicus* and as attorney for one of the parties or an intervenor, most recently in *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

The National Cattlemen's Association (NCA) is national spokesman for all segments of the nation's beef cattle industry – including cattle breeders, producers and feeders. This non-profit trade association was officially formed on September 1, 1977, through consolidation of the American National Cattlemen's Association (founded in 1898) and the National Livestock Feeders Association (founded in 1940). NCA represents 300,000 cattlemen throughout the United States. NCA membership includes

40,000 individual members, 47 affiliated state cattle associations and 32 affiliated national beef breeder organizations.

NCA provides the beef cattle industry with an organization through which its members function collectively to advance the economic, political and social interests of the U.S. cattle industry and to work toward solution of industry problems in the national economy. NCA's principal services are to manage industry issues, to influence government, to influence public opinion, to provide information and to serve as spokesman for the industry.

Both Mountain States Legal Foundation and the National Cattlemen's Association and their members are greatly concerned with the erosion of private property rights taking place in the name of "environmental protection." Whether the objective is the preservation of so-called "wetlands" or the protection of "threatened" or "endangered" species, the burden for such social, political and public benefit is placed upon private individuals and the lands which they own.

It is the members of Mountain States Legal Foundation and the National Cattlemen's Association who are asked to absorb the costs of the public use of their land, contrary, assert *amici*, to the Fifth Amendment to the Constitution. While Petitioner certainly speaks to the cost to him personally of the actions by the South Carolina Coastal Council and while Respondent speaks to its views as a governmental entity, neither can speak to the national significance and importance of the instant case.

MSLF and NCA, speaking on behalf of more than a quarter of a million Americans, address these issues. The views presented by MSLF and NCA will further aid this Honorable Court in deciding the instant matter.

For the foregoing reasons, Mountain States Legal Foundation and the National Cattlemen's Association request that this motion to file the annexed brief of *amici curiae* be granted.

DATED: January 2, 1992.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND THE NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* in support of Mr. David H. Lucas, the Petitioner.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation organized pursuant to the laws of the State of Colorado and dedicated to bringing before the courts those issues vital to

the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country, including South Carolina. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in environmental and property rights issues.

MSLF has participated in numerous cases before this Honorable Court both as an *amicus* and as attorney for one of the parties or an intervenor, most recently in *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

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industry problems in the national economy. NCA's principal services are to manage industry issues, to influence government, to influence public opinion, to provide information and to serve as spokesman for the industry.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amici adopt the Petitioner's Statement of the Case and Statement of the Facts.

SUMMARY OF ARGUMENT

In order to determine when the Fifth Amendment requires the payment of "just compensation" to the victim of a "regulatory taking," courts have been required to choose between two mutually exclusive tests: the "diminution in value" test, which requires the payment of "just compensation" under the Fifth Amendment; and the "nuisance exception" test which upholds government regulation without compensation to the property owner. The instant case compels this Honorable Court to clarify the manner in which these tests are to be applied, by delineating the murky middle ground where these tests collide.

The "diminution in value" test necessitates that, when government regulation denies an owner the ability to make economically viable use of his or her land, the government must exercise its power of eminent domain and pay "just compensation."

On the other hand, the "nuisance exception" obviates any requirement for the payment of "just compensation" if the governmental entity merely regulates a land use which invades the rights of nearby property owners. Since such an invasion cannot take place unless the regulated land use constitutes a public nuisance, the "nuisance exception" must be limited to cases of nuisance.

In its opinion below, *Lucas v. South Carolina Coastal Council*, 404 S.E. 2d 895 (S.C. 1991), the Supreme Court of South Carolina misconceives and misapplies both tests. First, the court expands the "nuisance exception" until it swallows the Fifth Amendment, holding that the state may utilize the "nuisance exception" – and thereby be protected from the payment of "just compensation" – simply by designating any land use which it seeks to prohibit as "harmful." Second, the court then uses this aberration to obliterate the "diminution in value" test, holding that the test is inapplicable as a result of the state's decision that the targeted land use is "harmful." According to the South Carolina Supreme Court, that decision by the state is enough to shield the state from the payment of "just compensation" and to deny citizens the protection of the Fifth Amendment even when the state's decision completely destroys individual property rights.

The decision of the Supreme Court of South Carolina violates both the Takings Clause as well as numerous Supreme Court precedents. Therefore, this Honorable Court must reverse the judgment of the South Carolina Supreme Court and vindicate Mr. Lucas' constitutional rights.

ARGUMENT

I. AN ACT OF REGULATION WHICH DENIES AN OWNER ECONOMICALLY VIABLE USE OF HIS OR HER LAND REQUIRES AN EXERCISE OF EMINENT DOMAIN AND THE PAYMENT OF JUST COMPENSATION.

Imposition of a regulation which denies an owner the economically viable use of his or her land is equivalent to an exercise of the power of eminent domain, and requires the payment of "just compensation." Because the South Carolina Coastal Commission's (Commission's) set-back line prohibited Petitioner from making any use of his property, the judgment of the South Carolina Supreme Court must be reversed.

The police power and the power of eminent domain are distinctly different concepts. In the exercise of eminent domain, property or an easement therein is taken from the owner and applied to public use. Under the exercise of police power, government regulation denies the owner the full use of his property, but the property is not actually seized by the government. *See generally*, 1 *Nichols, Eminent Domain* § 1.42(2) (Rev. 3d ed. 1990).

However, when regulation goes too far, there must be an exercise of eminent domain and the payment of just compensation to sustain the action of the governmental entity.

This rule dates from the seminal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Pennsylvania Coal*, the Court ruled upon the validity of a state statute barring the mining of coal in such a way as to cause the subsidence of any structure used for human habitation.

The question presented was whether the police power could be stretched far enough to cover this regulation.

Writing for the Court, Justice Holmes answered in the negative. After noting that "the right to coal consists of the right to mine it," Holmes stated that "[t]o make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Because the statute barred the owner from making use of his property, it was equivalent to an exercise of the power of eminent domain and required the payment of "just compensation."

This decision has remained the cornerstone for Takings Clause analysis for almost 70 years. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), contains an especially clear statement of that reasoning. In *Penn Central*, the Court held that "[w]e must consider whether the interference with appellants' property interest is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain it,' " *id.* at 136 (quoting *Pennsylvania Coal*), and emphasized that the city's zoning ordinance could be upheld only because it did not deny Penn Central's right to make "economically viable use" of its property. *Id.* at 138, n. 36.

Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987), upholds the same reasoning. In *Keystone*, the issue was whether another Pennsylvania statute restricting mining operations in order to prevent surface subsidence violated the Takings Clause guarantee. Using a two-pronged analysis, the Court affirmed the statute First, it concluded that the statute fell within the "nuisance exception" and hence did not trigger the requirement

of "just compensation." It then held that Keystone had also "failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases." *Id.* at 492.[1]

Application of these principles to the instant case is simple. The trial court found that Lucas had been denied "all incidence of private ownership" of his property and that the property had "been rendered valueless" by the Commission's action. *Lucas v. South Carolina Coastal Commission*, C/A No. 88-CP-10, slip. op. at 2-3 (C.P. Charleston County, S.C. Jan. 5, 1989). Under the standard enunciated by the U.S. Supreme Court, this action amounted to an assertion of eminent domain without "just compensation." Clearly, the judgment of the South Carolina Supreme Court must be reversed.

The South Carolina Supreme Court holding that *Keystone* implicitly overruled *Pennsylvania Coal* and its progeny must be brushed aside. First, it is not within the province and the authority of the South Carolina Supreme Court to simply ignore clearly stated U.S. Supreme Court precedent. Second, the analysis of the Supreme Court of South Carolina is neither sound nor persuasive.

The South Carolina Supreme Court held, essentially, that under *Keystone* the "nuisance exception" must be

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[1] Numerous other cases uphold *Pennsylvania Coal*'s rule. *See, e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Agins v. Tiburon*, 447 U.S. 255 (1980); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

applied to all cases of government regulation, including the instant case.[2] This interpretation is faulty for a number of reasons. First, it presupposes that the *Keystone* Court casually overruled the entire *Pennsylvania Coal* line of cases without so much as a single word of comment. To the contrary, the *Keystone* Court actually reaffirmed *Pennsylvania Coal* and its progeny. Second, this interpretation presupposes that the nuisance exception must have been applied, in the past, to the *Pennsylvania Coal* line of cases. However, as Chief Justice Rehnquist noted in *Keystone*, the Court has never applied the "nuisance exception" to allow complete extinction of the value of a parcel of property. *See Keystone, supra*, at 513 (Rehnquist, C.J., dissenting). The reason for this is straight forward. Under *Pennsylvania Coal*, the government is forced to exercise its power of eminent domain, triggering the "just compensation" requirement. In contrast, the "nuisance exception" only applies to the police power. Conceptually, the two are very different.

Clearly, then, *Keystone* could not be used to eliminate the "just compensation" requirement in the instant case. This Court must reverse the judgment of the South Carolina Supreme Court.[3]

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[2] As will be demonstrated below, the true scope of the "nuisance exception" does not even come close to encompassing this case.

[3] The great majority of lower court cases agrees that *Pennsylvania Coal's per se* compensation requirement survives *Keystone*. *See McDougal v. County of Imperial*, slip op. at 12-20 (9th Cir. Aug. 20, 1991) ("We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use."); *Esposito v. South Carolina Coastal Council*,

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II. THE NUISANCE EXCEPTION TO THE FIFTH AMENDMENT IS STRICTLY LIMITED TO ACTIVITIES TANTAMOUNT TO PUBLIC NUISANCES.

The "nuisance exception" provides that the government may regulate private land use without triggering the Fifth Amendment's "just compensation" requirement when the regulation is necessary to prevent an invasion of the rights of other members of the community. Since the rights of other members of the community can be invaded only by a public nuisance, the "nuisance exception" to the Fifth Amendment must be limited to cases of nuisance.

Mugler v. Kansas, 123 U.S. 562 (1887), was the genesis of the "nuisance exception." In *Mugler*, the issue was whether the state could bar Mugler from manufacturing

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slip op. at 7-10 (4th Cir. July 3, 1991); *Whitney Benefits, Inc. v. United States*, 926 F. 2d 1169, 1176 (Fed. Cir. 1991) ("Nothing in *Keystone* . . . supports the notion that public purpose alone permits the total destruction of property rights without compensation."); *Yancey v. United States*, 915 F. 2d 1534, 1540 (Fed. Cir. 1990) ("We favor . . . position that the *Keystone* opinion did not hold that the nature of governmental activity conclusively forecloses all claims for just compensation."); *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E. 2d 1000 (Ind. 1989) *cert. denied*, 110 S. Ct. 1130 (1990); *Easter Lake Estates, Inc. v. Polk County*, 444 N.W. 2d 72, 75-76 (Iowa 1989) ("Ordinarily, [police powers] may be exercised without payment of just compensation. The use of police power may rise to the level of a compensable taking, however, if the control or regulation substantially deprives the owner of the property's use and enjoyment.") (citations omitted). *Contra, Empire Kosher Poultry, Inc. v. Hallowell*, 816 F. 2d 907 (3d Cir. 1987)

alcohol on his property. Mugler challenged the statute on the grounds that it destroyed his property interest in his brewery equipment without "just compensation."

The Court rejected Mugler's claim. Its reasoning rested on two propositions. The Court found that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 123 U.S. at 665. The Court held further that the manufacture of a noxious substance like alcohol harmed the community. Thus, concluded the Court, the state could destroy Mugler's property interests without compensating him for his loss.

A close reading of *Mugler* demonstrates that the exception created by the Court was limited to activities tantamount to a public nuisance. The state argued that buildings used for the production or sale of alcohol constituted a nuisance. *Mugler*, 123 U.S. at 652. The Court agreed, using the term "nuisance" to describe Mugler's business 14 times during its opinion.[4]

On a more basic level, the Court's reasoning would not permit any expansion of the "nuisance exception" beyond the narrow circumstance of enjoining a public nuisance. *Mugler* was founded upon the very simple ground that a governmental entity could bar property owners from invading the rights of other members of the

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[4] In *Florida Rock Indus. v. United States*, 791 F. 2d 893, 900 (Fed. Cir. 1986), the Federal Circuit concurred with this analysis, attributing *Mugler* to the Court's view of alcohol as a "septic" fluid. Thus, the specific holding in *Mugler* can be attributed to the era's vigorous temperance movement.

community without any requirement that the governmental entity pay "just compensation." The actions of such a governmental entity could be justified only if the prohibited activity constituted a nuisance. Thus, *Mugler*'s "nuisance exception" to the requirements of the Fifth Amendment is just that: a *nuisance* exception.

Curtin v. Benson, 222 U.S. 78 (1911), continued this line of reasoning. In *Curtin*, the issue was whether the Secretary of the Interior could condition a private landholder's right to graze livestock – upon his own land – on compliance with regulations allegedly designed to protect Yosemite National Park, which surrounded the private land. Imposition of the conditions would have destroyed the landholder's ability to make use of his land.

The Supreme Court struck down the restrictions, holding that the government could only prevent "a misuse or an illegal use" without paying "just compensation." *Id.* at 86. The Court held that the "nuisance exception" did not allow the government to bar a "legal and essential use, an attribute of its ownership," *id*, even though the government considered that use to be harmful.

Modern cases have preserved this essential element of the right to own and use property. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 (1987), contains the Court's most recent discussion of the issue. In *Keystone*, the question was whether a state statute restricting coal mining in order to guard against surface subsidence effected an unconstitutional taking of private property. The Court ruled that because such mining was

"tantamount to a public nuisance," it fell within the "nuisance exception." *Id.* at 491.[5]

The *Keystone* Court provided an especially clear statement of its rationale. Citing *Mugler*, the Court declared that all property is held subject to the restriction that the owner cannot use it in a way that would be "injurious" to others, and noted that "the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Id.* at 492. The Court added that the "nuisance exception" could be understood "on the simple theory that since no individual has a right to use his property so as to create a nuisance . . . the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Id.* at 491, n. 20.[6]

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[5] Other "nuisance exceptions" to the Fifth Amendment have also rested on discrete and narrow circumstances. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (urban brickyard); *Miller v. Schoene*, 276 U.S. 272 (1928) (forest infected with apple rust disease located near apple orchards); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (quarrying below water table near town's water supply). Thus, the actual holdings of these cases are consistent and clear: the "nuisance exception" cannot be expanded beyond those uses that are public nuisances.

[6] Professor Epstein bases his concept of the Fifth Amendment on the mirror image of this explanation. Epstein asserts that the government possesses no rights or powers beyond those possessed by private citizens. Therefore, the government's power to regulate use of private property must be limited to cases of nuisance because that is the limit of the corresponding private right. As Epstein convincingly demonstrates, expansion of the "nuisance exception" beyond true

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It should be noted that the *Keystone* Court stated the exception in terms of uses "tantamount to public nuisances" or "nuisance-like" activities. *Keystone*, 480 U.S. at 491 & n. 20. Therefore, it must be conceded that, as the *Keystone* Court saw it, the "nuisance exception" does not simply elevate South Carolina nuisance law to constitutional status. Rather, as the final arbitrer of the meaning of the Consitution, the Court must determine what qualifies as a "nuisance exception" to the Fifth Amendment.

However, it is beyond doubt that the exception must be limited to nuisance-like activities. Expansion beyond such activities would not only violate the rationale for the exception's very existence, but would destroy the protection of property rights guaranteed by the Fifth Amendment. Thus, the Court must look to the common law for guidance in making its determination. The "nuisance exception" can apply only to acts which cause an unreasonable invasion of the property rights of others.

The "nuisance exception" is inapplicable to the present case. It is simply not possible to conceive of the construction of a beach front house as invading the property rights of others. The construction of a beach front bungalow bears little resemblance to the property uses which the Court has identified as public nuisances. Indeed, the South Carolina Legislature does not regard beach front homes as public nuisances. The South Carolina Beachfront Management Act provides for a gradual, forty-year retreat from the coastal zone. *See* S.C. Code

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nuisance is nothing more than theft cloaked in the garb of public policy. R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

Ann. § 48-39-280. If homes along the beaches of South Carolina constituted true public nuisances, the Legislature would have eliminated immediately such nuisances, not stretch their elimination out over several decades.

Instead this case concerns a naked attempt on the part of South Carolina to seize Lucas' property without paying "just compensation." This action does not even come close to the "nuisance exception."

The South Carolina Supreme Court held that all the state had to do to claim the protection of the "nuisance exception" was to declare the proposed land use "harmful." *See Lucas v. South Carolina Coastal Council*, 404 S.E. 2d 895, 899-902 (S.C. 1991). However, this holding is fatally flawed.

Its most obvious shortcoming is that it completely ignores the reasoning of the "nuisance exception" cases. The U.S. Supreme Court has carefully limited the "nuisance exception" to actions tantamount to a public nuisance. A simple declaration of "harm" cannot substitute for this factual basis. To find "harm" to be the equivalent of "nuisance" is to ignore the legal meaning of the latter. "Nuisance" means not merely the use of property that some segments of society may view as "harmful" or may not be the highest and best uses of such property, but uses that invade the property rights of others.

Thus, the "nuisance exception" to the Fifth Amendment prohibition against regulatory taking is an essential component of the protection of property guaranteed by the Constitution. Just as the Fifth Amendment protects the property of individuals from government intrusion,

the "nuisance exception" protects the property of individuals from the unreasonably intrusive actions of private parties. However, because of its ability to destroy the protections of the Fifth Amendment, the "nuisance exception" must be limited to true "nuisances."

The South Carolina Supreme Court apparently believes the "nuisance exception" should be co-extensive with the police power. However, this holding violates clearly stated Supreme Court precedent. "[A]s the current Chief Justice has explained, 'the nuisance exception to the takings guarantee is not coterminous with the police power itself.' " *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491 n. 20 (1987); *quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), contains an especially clear statement of this principle. In *Loretto*, the issue was whether a statute requiring landlords to allow cable television companies access to their properties violated the Takings Clause. After noting that enactment of the statute was within the state's police power, the Court ruled that "whether an otherwise valid regulation so frustrates property rights that compensation must be paid" was a separate question. *Id.* at 425.

The South Carolina Supreme Court's careless expansion of the "nuisance exception" virtually eliminates the Fifth Amendment, allowing any government to convert private property to public use simply by declaring the property owner's use of the property to be

"harmful." The essence of the Fifth Amendment lies in the proposition that the government cannot convert private property to public use merely by asserting its desire to do so. "[A] State, by *ipse dixit*, may not transform private property to public property . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The South Carolina Supreme Court's formulation would overturn these principles and allow any government to confiscate private property by simply declaring that public policy requires it.

CONCLUSION

As Justice Stevens aptly noted in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (Stevens, J., dissenting), this Honorable Court's regulatory takings decisions have been "open-ended and standardless." *Id.* at 340. This case presents the opportunity to draw coherent, principled distinctions under the Fifth Amendment. Justice demands that this Honorable Court seize this opportunity, and reverse the decision of the South Carolina Supreme Court.

It is an opportunity which this Honorable Court must seize, not simply because of the issues presented by the instant case, but because of the regulatory activities being

undertaken by governmental entities nationwide in the name of "environmental protection." Despite the claim of self-styled "environmentalists" that the American people are willing to pay any price to achieve "environmental goals," almost all of these "goals" are being achieved, not by "the constitutional way of paying for the change," but through a regulatory "shorter cut."

For example, federal officials have announced a national "no net loss of wetlands" policy by which they seek to regulate millions of acres of privately-owned land, not because the use of these lands by the owners will cause harm to their neighbors, but because federal officials believe these private lands serve a higher "public use" by remaining "wet" (even if they are not wet).

Furthermore, federal officials have announced recently their intention to designate an additional 3,000 plants and animals as endangered or threatened species under the Endangered Species Act. The Endangered Species Act prohibits certain conduct on private lands not because the prohibited uses of these private lands will interfere with the lands of others, but because Congress has declared that private lands must serve the "public use" of species habitat.

In the superheated environmental rhetoric of the day and in light of the "weird science" used to justify even the most Draconian of regulatory actions, these and other regulations may be the manner in which governmental entities will seek to soothe the nation's environmental conscience. However, the Constitution mandates that "[a] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

cut than the constitutional way of paying for the change." It remains for this Honorable Court to remind these forgetful governmental entities of the requirements of our Constitution.

Respectfully submitted,

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